

IN THE HIGHCOURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 637 OF 2001

RAJESH BHASIN	)
residing at D-50, Sector 40,	)
NOIDA (U.P.)	).. PETITIONER
	(Detenu)

Versus

1. THE STATE OF MAHARASHTRA	)
2. SHRI G. S. SANDHU	)
Secretary to the Govt. of Maharashtra	)
Home Department (Special), MUMBAI	)
3. THE SUPERINTENDENT OF PRISON	)
The Mumbai Central Prison, Arthur Road	
Mumbai.	)
4. THE SUPERINTENDENT OF PRISON	)
Nasik Road, Central Prison, Nasik	)

5. THE COMPETENT AUTHORITY)
SAFEMA/NDPS, Mittal Court,)
'C' Wing, 3rd floor, Nariman Point,)
MUMBAI 400 021).. RESPONDENTS

Mr. Masood Khan for petitioner

Mr. R. M. Agarwal for respondents

[Mr.D.S.](#) Mhaispurkar, APP.

CORAM:-SMT. RANJANA DESAI &

A. S. OKA, JJ.

DATED:- 6-10-2004

ORAL JUDGMENT:-(Per Smt. Ranjana Desai, J.)

The petitioner (“the detenu” for convenience) was detained under an order of detention dated 20th July, 1999 issued by the Secretary to the Govt. of Maharashtra (Prevention Detention), Home Department who was specially empowered under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (“COFEPOSA” for short), with a view to preventing him in future for smuggling goods. The

order of detention along with the grounds of detention and the material in support thereof was served on the detenu on 18.9.1999. The detenu challenged the said order of detention by preferring Criminal Writ Petition No.716 of 2000. It appears that the detenu was released from detention as the period of detention got over.

2. On 19th September, 2000 the said petition came up before Division Bench of this Court and the Division Bench passed the following order:-

“Since the petitioner has already been released from detention at this juncture, nothing survives for our consideration. We, therefore, dismiss the instant petition with liberty to the petitioner to file fresh petition in case proceedings under SAFEMA are initiated against him.”

3. Pursuant to the liberty granted to the detenu as the SAFEMA proceedings were initiated against him, the detenu has filed the present petition challenging the order of detention dated 20th July, 1999.

4. We have heard Mr. Khan, learned Counsel appearing for the petitioner. Mr. Khan challenged the order only on one ground. He contended that between 21.9.1999 to 9.10.99, the [D.R.I.](#) Officers have recorded the statements of the detenu at the Mumbai Central Prison, Mumbai under Section 108 of the Customs Act, 1962. On or about 11.10.1999, the detenu through his advocate requested the sponsoring authority i.e. [D.R.I.](#) Mumbai to furnish him the copies of the said statements to enable him to move for revocation of order of detention. The detenu also made an application on or about 14th October, 1999 before the Additional Chief Metropolitan Magistrate, 3rd Court, Mumbai praying for a direction to the [D.R.I.](#) Authorities to furnish him the copies of the said statements to enable him to make an effective representation to the Government and the Advisory Board. To the said application, the sponsoring authority filed its reply wherein it was stated that the copies of the statements shall be furnished to the detenu at the appropriate time as per law. Mr. Khan stated that the detenu was interviewed by the Advisory Board on 20th November, 1999 and the copies of the said statements were placed before the Members of the Advisory Board. Mr. Khan submitted that since they were placed before the Advisory Board they were obviously most relevant, vital and material documents, capable of influencing the mind of the Advisory Board. The detenu had, therefore,

demanded the said documents from the sponsoring authority and he had even made an application before the learned Additional Chief Metropolitan Magistrate, Mumbai praying for a direction to the sponsoring authority that the copies of the said statements be supplied to him. Yet the said documents were not supplied to him. This in the opinion of Mr. Khan has violated the detenu's right to make an effective representation before the Advisory Board. The detenu is severely prejudiced on account of the said non-supply of the documents. Mr. Khan submitted that in view of this, this court should set aside the order of detention. In support of his submission Mr.Khan relied on **Ashok Kumar v. Union of India & Ors., 1988 (35) E.L.T. 441(SC).**

5. Mr. Agarwal, learned counsel appearing for the respondents on the other hand submitted that the detenu having been released from detention the present petition is no longer a habeas corpus petition but it is in the nature of a petition praying for a writ of certiorari and, therefore, the approach of this court must necessarily change. Mr. Agarwal submitted that in view of this, this court can certainly go into the conduct of the detenu and other relevant facts which this court perhaps would not have been able to do if the detenu was still in custody and this court was dealing with a habeas corpus petition.

6. Mr. Agarwal then contended that the detenu had filed Criminal Writ Petition No. 716 of 2000. The Advisory Board meeting was held on 20-11-1999. In the earlier petition a similar point was taken. That point was also replied by the detaining authority in his affidavit saying that the said documents were not placed before him while issuing the order of detention and, therefore, there was no obligation cast on the detaining authority to supply them to the detenu. It was further stated that the said documents were generated after the order of detention was issued and hence they were placed before the Advisory Board but they were not considered by the detaining authority at the time of issuing the detention order. The said petition was withdrawn on 19th September, 2000.

7. Mr. Agarwal contended that if really and truly the detenu's right to make an effective representation was vitiated the said point ought to have been urged in the earlier petition as it was specifically taken in the petition and the detaining authority had also replied to. Mr. Agarwal contended that the fact that the point was not urged at that stage indicates that the grievance of the detenu is not genuine.

8. Mr. Agarwal further contended that though the detenu had made

an application for the supply of documents on 14th October, 1999 when the Advisory Board meeting was held on 28th November, 1999, no grievance was made before the Advisory Board by him that the documents were not supplied to him. Further no application was made to the detaining authority for supply of the said documents. Mr. Agarwal urged that in view of this conduct of the detenu this court should adopt a pragmatic approach and draw the necessary inference that this grievance is raised only to defeat the SAFEMA proceedings.

9. Mr. Agarwal then contended that admittedly these documents were generated after the order of detention was issued. In the nature of things, therefore, they could not have been considered by the detaining authority while issuing the order of detention. Undoubtedly they were placed before the Advisory Board and might have been considered by the Advisory Board while confirming the detention of the detenu but on account of this the initial order of detention is not vitiated and at the most continued detention of the detenu could be said to be vitiated. In this connection the learned counsel relied on Meena Jayendra Thakur v. Union of India, A.I.R. 1999 S.C. 3517., Mrs. Kunika Randhir Singh v. Union of India & Ors., Criminal Writ Petition No. 987 OF 2001., Kirit Kumar Narulla v. State of Maharashtra & Ors., 2004 (3) M.L.J.

505.

10. Mr. Agarwal then contended that the detenu has studied upto B. Com. His statements about which he has made a grievance have been written by him in his own hand. The detenu, therefore, knows the contents thereof. The said statements are inculpatory statement. Mr. Agarwal contended that if the statements were exculpatory it could have been urged that the Advisory Board's opinion would have perhaps tilted in favour of the detenu. Since they were inculpatory statements their placement before the Advisory Board could never adversely affect the detenu. In this connection the learned counsel relied on **Madan Lal Anand v. Union of India & Ors. A.I.R. 1990 S.C. 176 .**

11. We have given our anxious consideration to the submissions advanced by both sides.

12. Admittedly the detenu's statements were recorded after the order of detention was issued and therefore, they could not have been considered by the detaining authority while issuing the order of detention. So far as validity of the detention order is concerned what would be material is the state of mind of the detaining authority when he issued

the order of detention. The documents being not in existence when the detaining authority issued the order they were not placed before the detaining authority and consequently not considered by him while issuing the detention order.

13. The limited question with which we are concerned is whether, if the documents which came into existence after the order of detention is issued are placed before the Advisory Board, they should be supplied to the detenu or not and whether if such documents are not supplied to the detenu, the order of detention is vitiated thereby.

14. Reliance was placed by Mr. Khan on the judgment of **Ashok Kumar (Supra)**. The Supreme Court was concerned with an order of detention issued under the COFEPOSA. The appellant therein had prayed for quashing of the said order of detention on the ground that the documents relied upon by the detaining authority were not supplied to him along with the grounds of detention. There was infringement of Section 3(3) of the COFEPOSA and therefore, the appellant's right to make an effective representation was violated. While dealing with this point the Supreme Court observed that at the request of the appellant, the documents were supplied to him on 24th August, 1987. The

representation of the appellant was disposed of by the Advisory Board on 25th April, 1987. Against the backdrop of these facts the Supreme court observed that that failure on the part of the detaining authority to supply material documents prevented the appellant from making an effective representation against the order of detention. There was violation of Article 22(5) of the Constitution of India.

15. In our opinion this judgment has no application to the facts of the present case. In that case the Supreme Court was dealing with requirement of Article 22(5) read with Section 3(3) of the COFEPOSA of supplying relied upon documents along with the grounds of detention or in any event not later than fifteen days from the date of detention. The said documents were placed before the detaining authority. Such is not the case here. Moreover, the point regarding non-supply of any documents placed before the Advisory Board was not even urged before the Supreme Court. It is interesting to note that even in such circumstances the Supreme Court referred to its judgment in **Kamla Kanahiyalal Khushalani v. State of Maharashtra & Anr., 1981 (2) SCR 459** and held that only the continued detention of the detenu would be rendered illegal. **Ashok Kumar's case**, therefore, does not help the petitioner.

16. In this connection, we may usefully refer to the Supreme Court's judgment in **Meena Thakur's case (supra)**. The Supreme Court was considering the question of non-intimation to the detenu of his right of making representation against the declaration issued under section 9 of the COFEPOSA. In that case also the period of detention was over but the proceedings of SAFEMA had been initiated. It was argued before the Supreme Court that the detenu must be intimated that he has a right to make a representation to the declaring authority against the declaration and non-intimation of the said right infringed upon the right of the detenu to make a representation under Article 22(5). The question was whether initial order of detention issued under Section 3(1) of the COFEPOSA Act could be held to be ab initio void on account of the non-intimation of the right to make a representation against the declaration to the detenu, which was also an infraction of Article 22(5) of the Constitution of India.

17. The Supreme Court considered the relevant provisions of the COFEPOSA and held that “the infraction of the constitutional right to make a representation on account of non-intimating the detenu about his right to make a representation or the opinion of the Advisory Board and the order of detention not being made within the period prescribed under law does not get into the satisfaction of the detaining authority while

making an order of detention under Section 3(i) of the COFEPOSA Act.”

The Supreme Court observed that if the detaining authority on the basis of materials before him did arrive at his satisfaction with regard to the necessity for passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of subsequent infraction of the detenu's right or of non-compliance of the procedure prescribed under law. On such infraction and for non-compliance of the procedure prescribed under the law, the further detention becomes illegal but it does not affect the validity of the order of the detention itself issued under Section 3(i) of the COFEPOSA Act by the detaining authority.

18. In our opinion, as observed by the Supreme Court, in a given case at best the non-supply of such documents would amount to subsequent infraction of Article 22(5) of the Constitution of India . In the light of the above observation we are unable to come to a conclusion that non supply of documents which came into existence after the detention order was issued and which were placed before the Advisory Board, would vitiate the order of detention issued against the detenu.

19. We may also refer to the decision of Division Bench of this court in **Kunika Singh's case (supra)** where this court was considering the

delay in considering the representation of the detenu. In the facts of that case the court found that the subjective satisfaction of the detaining authority to detain the detenu under Section 3(1) of the COFEPOSA Act was based on cogent material placed before him and unexplained delay in considering the representation of the detenu would only vitiate the continued detention of the detenu and not the order of detention. This court clarified that if there is any infirmity which has no nexus with the material on which the subjective satisfaction of the detaining authority to detain the detenu rests only the continued detention of the detenu would get vitiated and not the detention order.

20. In this case assuming that non-supply of documents is an infirmity, it relates to documents which were not placed before the detaining authority and which could not have been placed before the detaining authority while issuing the detention order. Therefore, the order of detention cannot be vitiated on that count.

21. It is necessary to see whether in the facts of this case the continued detention would be vitiated. We also find merit in Mr. Agarwal's submission based on Madanlal's case (supra) that the said documents would not have tilted the satisfaction of the Advisory Board in

favour of the detenu. The detenu is a qualified person. He is B.Com and the statements are written in his own handwriting. The detenu was therefore, aware of the contents. Moreover they are inculpatory statements. We do not see how placement of inculpatory statements before the Advisory Board could have tilted the opinion of the Advisory Board in favour of the detenu. Therefore, nonsupply of these documents to the detenu cannot affect the detenu's right of making an effective representation. It cannot be said that on account of the said non-supply continued detention of the detenu is rendered illegal.

22. Moreover, we are of the confirmed opinion, that this plea of the detenu is not genuine. We have already noted that in the earlier petition the detenu had taken this point. The detaining authority had filed his reply. Advisory Board meeting was held on 28th November, 1999. The detenu did not make any request before the Advisory Board for supply of the said documents. He did not apply to the detaining authority. No grievance was made in this court when the earlier petition was heard, though this point was urged and reply was filed. The earlier petition was withdrawn on 19th September, 2000 because the detenu was released from detention. It is true that he was given liberty to file a petition of SAFEMA proceedings are initiated. But if the grievance was genuine he could have

made it before this court when the earlier petition was called on for hearing. In the circumstances, we find no merit in this petition.

The petition is dismissed.

(SMT. RANJANA DESAI, J)

(A. S. OKA, J.)